No. 94-390

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In the Supreme Court of the United States

OCTOBER TERM, 1994

AMERICAN WATER DEVELOPMENT, INC., PETITIONER

v.

CITY OF ALAMOSA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner holds absolute ownership to the groundwater beneath the Baca Grant No. 4, so as to render petitioner's use of that groundwater beyond the reach of the State's legal regime concerning rights to the use of water.

2. Whether this Court should consider petitioner's contention that the Colorado courts violated the Due Process Clause of the United States Constitution by assessing certain litigation fees and costs against petitioner, when petitioner failed timely to raise that contention in its appeal to the Colorado Supreme Court.

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OPINIONS BELOW

The opinion of the Colorado Supreme Court (Pet. App. A1-A93) is reported at 874 P.2d 352. The opinions and orders of the district court (Pet. App. A94-A100, A110-A114, A127-A128)[1] are unreported.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on May 9, 1994. A timely petition for rehearing was denied on June 6, 1994. Pet. App. A131-A132. The petition for a writ of certiorari was filed on September 1, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

[1] The district court also issued various opinions and orders that are not reproduced in the appendix to the certiorari petition.

STATEMENT

This litigation commenced when petitioner filed an application in the Colorado state district court seeking a determination concerning rights to groundwater beneath certain lands in Colorado to which petitioner claimed ownership. Petitioner's application alleged four alternative claims, each based on a different legal theory. Petitioner later moved to dismiss one of its claims without prejudice. The trial court granted that motion, but did so on the condition that petitioner pay the opponents' costs and fees attributable to the claim. Petitioners' other claims were rejected on the merits by the trial court. The Colorado Supreme Court affirmed all of the trial court's rulings.

1. Petitioner and others initiated this litigation in the Colorado state courts in 1986 by filing an application (Pet. App. A133-A155) seeking to establish the right to withdraw 200,000 acre-feet of groundwater annually from wells to be located on certain lands situated in the San Luis Valley in south-central Colorado. The subject lands totalled more than 100,000 acres in two parcels. The smaller parcel, consisting of approximately 4,683 acres, is located near Villa Grove, Colorado. The larger parcel consists of the Baca Grant No. 4 and adjacent lands, situated to the south of Villa Grove. *Id.* at A7-A8.

In its original application, petitioner[2] asserted four alternative claims: (1) a claim for determination of a right to nontributary groundwater pursuant to Colo. Rev. Stat. § 37-90-137(4) (1990) (the "nontributary

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[2] Although several co-applicants were named in the original application, petitioner subsequently filed an amended application in which it was listed as the sole applicant. Pet. App. A7 n.2. The amended application also differed from the original one in certain particulars not at issue here. See *Id.* at A9.

claim"); (2) a claim based upon Spanish and Mexican law, as confirmed pursuant to the Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico (Treaty of Guadalupe Hildalgo), Feb. 2, 1848, 9 Stat. 922, to the groundwater underlying the Baca Grant No. 4 (the "Hispanic land grant claim"); (3) a claim based on the Act of June 21, 1860, ch. 167, 12 Stat. 71, to the groundwater underlying the Baca Grant No. 4 (the "federal land grant claim");[3] and a claim pursuant to Colo. Rev. Stat. §§ 37-92-101 *et seq.* (1990) for a determination of a water right for tributary groundwater (the "tributary claim"). Pet. App. A8-A9, A133-A155. Various entities, including the United States, filed objections to the application pursuant to Colo. Rev. Stat. § 37-92-302(1)(b) (1990). See Pet. App. A7 n.3.

2. The objectors moved for partial summary judgment on the land grant claims. On July 5, 1990, the district court entered partial summary judgment dismissing those claims. Pet. App. A94-A100. By this ruling, the court rejected petitioner's position that its ownership of the Baca Grant No. 4 encompasses absolute entitlements to groundwater that "exist entirely independent of Colorado's constitutional and statutory system for allocating its water resources." *Id.* at A95.

3. The district court then set petitioner's remaining claims for a trial scheduled to begin on October 15, 1991. On September 26, 1991, the court held a pretrial conference. Near the conclusion of that conference, petitioner submitted a motion (Pet. App. A356-A357) for the voluntary dismissal, without prejudice, of its tributary claim. Subsequently, after briefing and oral argument, the court granted the motion, but did so

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[3] The second and third claims are collectively referred to as the "land grant claims."

"subject to the condition that [petitioner] pay to Objectors all of their attorneys' fees, expert witness fees and costs, and other fees and expenses related to the Tributary Claim." *Id.* at A113. The court also stated that, immediately following the trial on the nontributary claim, it would hold an evidentiary hearing concerning the amounts to be so awarded. *Id.* at A114.

4. The case then proceeded to trial on the nontributary claim, which by then was the sole remaining claim. After the trial, the court ruled against petitioner on that claim and entered a judgment and decree denying and dismissing petitioner's application.

Thereafter, the court held an evidentiary hearing to determine the amounts of costs and fees (including costs related to the nontributary claim) to be awarded for all phases of the litigation. Ultimately, the court entered a judgment for the objectors totaling $2,236,790.40 for attorneys fees, expenses (including expert witness fees), and costs incurred in defending against the tributary claim, as well as $473,091.31 for other costs incident to the litigation resulting in dismissal of the nontributary claim. Pet. App. A58. Petitioner appealed both judgments to the Colorado Supreme Court, which consolidated the appeals.

5. The Colorado Supreme Court affirmed on all issues. Pet. App. A1-A93. As to petitioner's land grant claims, the court, after describing the history of the Baca Grant No. 4 (*id.* at A14-A21), concluded that "title to the Baca Grant No. 4 did not derive from the Mexican government or its Spanish predecessor." *Id.* at A25. Rather, the court held that the grant was solely federal in character. The court further found that the federal grant did not carry with it any incidents of Hispanic law or any other attribute that would defeat the application

of Colorado's legal system of water rights. *Id.* at A25-A29.

The court also upheld the trial court's action of conditioning the voluntary dismissal of petitioner's tributary claim, without prejudice, on the obligation that it pay the objectors' costs and attorneys fees attributable to that claim. The Colorado Supreme Court found that Colorado procedures authorize the Colorado courts to award fees and expenses as a condition of voluntary dismissal of a claim (Pet. App. A64-A68) and that this power is not affected by the Colorado rules specially applicable in water adjudication proceedings (*id.* at A68-A69). The Colorado Supreme Court further found that the trial court had applied the correct standards when it granted the motion for voluntary dismissal (*id.* at A70-A73) and that the amounts awarded were supported by the record (*id.* at A73-A86).

ARGUMENT

Petitioner contends that the Colorado Supreme Court erred by finding that the groundwater underlying the Baca Grant No. 4 is subject to Colorado's water rights laws. Petitioner also maintains that the Colorado courts violated the Due Process Clause of the United States Constitution by requiring the payment of the objectors' allocable fees and costs as the condition for granting petitioner's motion for the voluntary dismissal, without prejudice, of its tributary claim. Petitioner's contentions are without merit and present no issue warranting this Court's review.

1. Parts II and III of petitioner's water rights application sought confirmation of absolute and undiminished ownership rights to all groundwaters beneath the Baca Grant No. 4, based upon "Spanish and Mexican Law as recognized and affirmed by the United States" (Pet. App.

A143), and, alternatively, upon the theory that the United States' conveyance of the subject tract to petitioner's predecessor-in-interest carried with it absolute water rights. *Id.* at A148-A150. The essential facts are as follows.[4]

Acting upon a petition filed in 1821, the Mexican government conferred an undetermined amount of land in present-day New Mexico upon Luis Maria Cabeza de Baca and seventeen of his male children. Pet. App. A161-A168. Subsequently, in 1835, after Baca had left the tract, Juan de Dios Maese and others petitioned the Mexican government to grant them the same lands, commonly referred to as the "Vegas Grandes," previously granted to Baca. Don Maese and the others were granted title to, and put in possession of, the Vegas Grandes, with the provision that persons who owned no lands were also to be allowed to settle on the tract. Thus, many families settled on the Vegas Grandes, which became the town of Las Vegas. *Id.* at A159.

By the Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922 (Pet. App. A195-A219), executed in 1848, sovereignty over lands north of the Rio Grande, including the Vegas Grandes, transferred to the United States. Article VIII of the Treaty provided that after cession the United States would respect the property held by Mexican citizens in the ceded territory. 9 Stat. 929-930 (Pet. App. A203-A204). To effectuate that provision, Congress, by the Act of July 22, 1854, ch. 103, 10 Stat. 308 (Pet. App. A220-A226), created the office of Surveyor General of the Territory of New Mexico and, in Section 8 of the Act, 10 Stat. 309 (Pet. App. A223-A224), charged that officer with the duties of examining into all

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[4] These facts are also set out in *Shaw* v. *Kellogg*, 170 U.S. 312 (1898), which concerned the Baca Grant No. 4.

land claims within the Territory and reporting to Congress.

The Surveyor General's report was transmitted to Congress in 1860. H.R. Exec. Doc. No. 14, 36th Cong., 1st Sess. (1860) (Pet. App. A156-A194). With respect to the Vegas Grandes tract, the Surveyor General, after detailing the facts and circumstances of the two conflicting grants, concluded (*id.* at A193-A194):

> It is firmly believed that the land embraced in either of the two grants is lawfully separated from the public domain and entirely beyond the disposal of the general government, and that in the absence of the one the other would be a good and valid grant; but as this office has no power to decide between conflicting parties, they are referred to the proper tribunals of the country for the adjudication of their respective claims, and the case is hereby respectfully referred to Congress through the proper channel for its action in the premises.

The anticipated adjudication to resolve the conflicting claims, however, never materialized. The Senate Committee on Private Land Claims, in recommending legislation concerning the claims addressed in the Surveyor General's report, stated that "[t]he claimants under the title to Baca * * * have expressed a willingness to waive their older title in favor of the settlers [of the Vegas Grandes land], if allowed to enter an equivalent quantity of land elsewhere within the Territory," and the Committee recommended that the conflict be resolved on that basis. S. Rep. No. 228, 36th Cong., 1st Sess. 4 (1860) (Pet. App. A233). Congress then passed the Act of June 21, 1860, ch. 167, 12 Stat. 71 (Pet. App. A234-A237), in settlement of the New Mexico land claims. Accepting the Senate Committee's recommen-

dation concerning the conflicting Vegas Grandes claims, Congress provided in Section 6 of the 1860 Act, 12 Stat. 72 (Pet. App. A236-A237):

> That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las [V]egas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico, to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: *Provided, however*, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

The Territory of Colorado was organized in 1861. Act of Feb. 2, 1861, ch. 59, 12 Stat. 172. The first laws of the Territory, enacted in 1861, preserved the custom of the appropriation doctrine, which had previously existed in Colorado. Colo. Gen. Laws, 1st Sess., Legislative Assembly, Territory of Colorado 67 (1861); *Coffin* v. *Left Hand Ditch Co.*, 6 Colo. 443, 448 (1882).

A survey of the Vegas Grandes tract showed it to be 496,446.96 acres, and a certificate to that effect was issued to the Baca heirs. *Shaw* v. *Kellogg*, 170 U.S. 312, 315 (1898). In December 1862, the Baca heirs applied, pursuant to Section 6 of the 1860 Act, for the survey and location of the public domain lands in the San Luis Valley that became the Baca Grant No. 4. The tract was surveyed in 1863, and in 1864 title passed pursuant to Section 6. 170 U.S. at 320-322, 342-343.

2. The Colorado courts correctly concluded that no rights founded upon Hispanic law ever attached to Baca

Grant No. 4. As just discussed, prior to 1860, the Baca heirs and a rival group of claimants each asserted rights under Spanish or Mexican law to the Vegas Grandes. As noted in the Senate Report, however, the Baca heirs agreed to *waive* those claims in return for a right to select an equivalent amount of land elsewhere in the Territory. See *Wise* v. *Watts*, 239 F. 207, 224, 226-227 (9th Cir.), cert. denied, 244 U.S. 661 (1917). Congress accepted the proffered waiver by enactment of Section 6 of the 1860 Act, which makes no mention of conferring, with regard to the lands selected under it, any rights special to Spanish or Mexican law. Thus, the Baca Grant No. 4 was founded entirely upon Section 6 of the 1860 Act, which provision was enacted in response to petitioner's predecessors' announced willingness to obviate the need for an adjudication of the conflicting Hispanic grants by waiving their Hispanic land grant claim in return for the grant conferred by Section 6.[5] As the Colorado Supreme Court correctly recognized (Pet. App. A22), "[t]he result was a grant of lands in which no private rights had ever been recognized under the laws of Spain or Mexico and a waiver of a claim to other lands under which such rights could have been asserted by the claimants."

Petitioner's attempts to demonstrate rights based on Hispanic law are unpersuasive. Contrary to petitioner's suggestion (Pet. 18) that the 1860 Act recognized and

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[5] As the Colorado Supreme Court's resolution of the Hispanic land grant claim rested entirely upon its interpretation of Section 6 of the 1860 Act, a provision addressed exclusively to the special grant to the Baca heirs, petitioner's assertion (Pet. 14-16) that this case presents the opportunity for this Court to resolve alleged inconsistencies in state court decisions involving Hispanic land grants misses the mark.

confirmed its asserted Hispanic land grant, Section 6 of that Act indicates that Congress merely acknowledged that there were conflicting Hispanic-law claims to the Las Vegas lands: "[I]t shall be lawful for the heirs of Luis Maria Baca, *who make claim* to the said tract of land as is claimed by the town of Las [V]egas, to select *instead of the land claimed* by them, an equal quantity of vacant land." 12 Stat. 72. Hence, Congress settled the matter without the need for confirming the Baca claim. Nor is petitioner's position supported by this Court's decisions. Petitioner states (Pet. 18) that in *Lane* v. *Watts*, 234 U.S. 525, 528 (1914), this Court recognized that the 1860 Act confirmed the Bacas's Mexican grant. The portion of the *Lane* opinion petitioner refers to, however, merely purported to describe "the allegations of the [plaintiffs'] bill" (*ibid.*); this Court did not comment upon the accuracy of the plaintiffs' allegations. Petitioner's reliance (Pet. 19) on this Court's decision in *Colorado Co.* v. *Commissioners*, 95 U.S. 259 (1877), is also misplaced. *Colorado Company* did not involve Section 6 of the 1860 Act; it concerned a wholly different statute, the Act of July 1, 1870, ch. 202, 16 Stat. 646, which provided for the confirmation of title to a designated amount of lands situated within the original Hispanic land grant.

In short, petitioner's predecessors waived their Hispanic land claims and, instead, acquired title to the Baca Grant No. 4 solely by virtue of federal law, *viz.*, Section 6 of the 1860 Act. Federal land conveyances do not inherently carry water rights; rather, the nature and extent of the water rights, if any, accompanying such conveyances are, unless the United States otherwise provides, determined by the law of the locality in which the tract is situated. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 163-

164 (1935). Because Colorado had already adopted the appropriation doctrine when title to the Baca Grant No. 4 was conveyed in 1864, *Coffin*, 6 Colo. at 446-447, that conveyance did not carry water rights.

3. Petitioner's use of the groundwater beneath the Baca Grant No. 4 would be subject to Colorado law even if that tract had been a confirmed Hispanic land grant. The English and American common law rule was that the surface owner held unlimited dominion over all waters beneath his property. *Acton* v. *Blundell*, 12 M. & W. 324 (Exch. Chamber 1843), discussed in *United States* v. *Cappaert*, 508 F.2d 313, 318-319 (9th Cir. 1974), aff'd, 426 U.S. 128 (1976). The Hispanic law rule was identical. As the Arizona Supreme Court stated in *Maricopa County Mun. Water Conservation Dist. No. 1* v. *Southwest Cotton Co.*, 4 P.2d 369, 372 (1931):

> Both of these systems [the English common law system and the Roman/Hispanic civil law system] distinguish between well-defined natural streams and bodies of water on the one hand, and subterranean, percolating waters on the other. So far as the second are concerned, the principle governing them was, originally at least, the same under both systems. All rights to subterranean waters not flowing in definite known channels belonged to the owners of the soil.

It is well established that the States, under their police powers, may validly enact legislation (such as Colorado's water law statutes) abolishing or modifying "absolute" rights of water ownership where, as here, the affected party was not actually putting the subject water to beneficial use when the legislation was enacted. *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 354-356 (1908); *United States* v. *Cappaert*, 508 F.2d at 318-319; *Town of Chino Valley* v. *City of Prescott*, 638

P.2d 1324, 1328 (Ariz. 1981), appeal dismissed, 457 U.S. 1101 (1982); *In re Waters of Long Valley Creek Stream Sys.*, 599 P.2d 656, 663 n.6 (Cal. 1979) (collecting state cases). Hence, petitioner's assertion that its ownership of the Baca Grant No. 4 entitles it to immunity from the Colorado law concerning water rights would fail even if the Baca Grant No. 4 were a confirmed Hispanic land grant.

4. Petitioner also contends (Pet. 23-30) that the award of costs and fees to the objectors violated the Due Process Clause of the Fourteenth Amendment because "it is fundamentally unfair to award attorneys fees and costs in favor of voluntary litigants who are not required to satisfy the most basic, fundamental requirements of standing" (Pet. 26). Petitioner, however, failed timely to raise the due process argument on its appeal to the Colorado Supreme Court.[6] Accordingly, this Court should not further consider that issue.[7]

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[6] The argument was first raised in the petition for rehearing filed by petitioner in the Colorado Supreme Court (Pet. App. A379). Petitioner made no Due Process Clause argument, or even any mention of that provision, in its opening and reply briefs to the Colorado Supreme Court. Petitioner did point out in those briefs that applicable Colorado law states that "any person who wishes" may file an objection to a water rights application, but alluded to that circumstance in arguing that the special Colorado procedures applicable in water rights proceedings do not allow for the award of costs and attorneys fees when a count in an application is voluntarily dismissed (*id.* at A371-A376). The only due process concern petitioner raised in the trial court was its assertion that the court was obligated to hold an evidentiary hearing prior to ruling on the voluntary dismissal motion (*id.* at A299-A306, A310-A321). Petitioner did not raise that due process contention in its appeal to the Colorado Supreme Court, nor does it do so now.

[7] Although petitioner asserts that the Colorado statutes allow any person, no matter how remote his interests, to file an objection

Petitioner also contends (Pet. 29) that "due process was * * * violated because [petitioner] was never afforded a full and fair opportunity to contest the Objectors' entitlement to the award." As the Colorado Supreme Court pointed out (Pet. App. A57-A58), however, the trial court received briefs from the parties and held a nonevidentiary hearing prior to ruling on the motion for voluntary dismissal of the tributary claim without prejudice. Hence, petitioner had ample opportunity to recommend to the court that the tributary claim should be dismissed with prejudice, or that it should be tried, rather than dismissed without prejudice but subject to the condition that the objectors be awarded the fees and costs they had incurred in defending against that claim. Petitioner, however, never asserted that it would prefer to suffer dismissal with prejudice or proceed to trial on the claim rather than have the motion conditionally granted. Hence, petitioner's contention that it was denied a full and fair opportunity to contest the objectors' entitlement to the award of costs and fees is meritless.[8] Petitioner's suggestion (Pet. 29-30) that the court was obligated by the Due Process Clause to

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to a water rights application, petitioner has never contended that any of the objectors to whom the trial court awarded costs and fees have no immediate interests in the present controversy. Indeed, as to the United States, the trial court entered a finding stating that "[b]ased upon the evidence * * * this Court can readily find, as a matter of both federal and Colorado law, that the federal reserved water rights would be materially injured by the Applicant's proposed ground water withdrawals." Findings of Fact, Conclusions of Law, Judgment and Decree 56 (Feb. 10, 1992).

[8] Petitioner does not now assert that the disposition of the motion required the trial court to resolve disputed issues of material fact, nor did it so argue on its appeal to the Colorado Supreme Court.

furnish petitioner, in advance of ruling on the motion, with the precise amount of costs and attorneys fees that would ultimately be imposed if the motion were to be conditionally granted was not raised below and, in any event, is insubstantial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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